STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 20, 2007
v	No. 264363 Kent Circuit Court
EDDIE ALLEN JACKSON, Defendant-Appellee.	LC No. 05-001746-FC

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 754.224f, carrying a concealed weapon, MCL 750.227, and carrying or possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as an habitual offender, second offense, MCL 769.10, to 5 to 15 years' imprisonment for his assault conviction, two to seven years and six months' imprisonment for possessing a firearm as a felon, two to seven years and six months' imprisonment for carrying a concealed weapon, and two years' imprisonment for his felony-firearm conviction. We affirm.

On June 1, 2004, Michael Sterling observed defendant drive into the parking lot of a gas station and speak with Montery Sterling, defendant's cousin. Later, Montery informed Michael that his conversation with defendant involved drugs. After the Sterlings left the gas station, they drove to a house located on Bates Street. Shortly after their arrival, defendant parked on the street, got out of his car, and "called Montery over" to him. Defendant and Montery began "arguing and cussing" and Montery punched defendant's face. As defendant staggered backward from the blow, he pulled out a gun and shot at Montery. Montery ran away but defendant continued shooting. Michael recalled defendant firing a total of three to five shots at Montery.

Tanya Kirkland and Vernon Simmons also observed defendant shoot at Montery. According to Kirkland, when defendant and Montery began arguing, defendant punched Montery, and only then did Montery punch defendant. Defendant subsequently removed a gun from the "pouch in his hoodie" and shot at Montery approximately two times. As Montery ran away, defendant shot at him approximately three more times. Simmons testified that he saw Montery and defendant argue. Montery knocked defendant to the ground, and Simmons subsequently heard three to four gunshots. He saw Montery run away.

At trial, defendant testified that, at the gas station on the morning of the shooting, he asked Montery "what he was selling." Montery replied, "quarters [of marijuana] for 40 dollars." Defendant said, "Let me get one of those . . . . I got 30." Montery refused to sell defendant the marijuana and said, "If you come up with the rest of the change, I be on Bates [Street], and just come holler at me." Later that day, defendant drove to Bates Street to talk to Montery. Defendant approached Montery and said, "I got 35 dollars, let me slide the five dollars." Montery replied, " . . . I ain't selling you [s--t] because I heard you was working with the [the police]." Defendant said, "Man, that's [f---ed] up because we supposed to be family." Montery asked, "What you say?" And as defendant turned, to respond to the question, Montery punched him in the face. Defendant stumbled backwards, removed his gun from his pants, and shot at Montery. Defendant did not recall how many times he fired the gun, but testified that it was more than twice. He claimed that he stopped firing when Montery started running.

Defendant first argues on appeal that he was denied his Sixth Amendment, US Const, Am VI, right to a jury drawn from a fair cross-section of the community because the number of African-Americans included in his jury venire was unfair and unreasonable. Because defense counsel initially raised this issue prior to jury selection, it is preserved for our review. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). We review questions concerning the systemic exclusion of minorities in jury venires de novo. *Id.*

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). The Sixth Amendment guarantees an opportunity for a representative jury by requiring that the arrays from which juries are drawn do not systematically exclude distinctive groups in the community. *Id*. at 472-473. However, a particular jury array need not mirror the community exactly. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997).

To establish a prima facie violation of the fair cross section requirement, defendant bears the burden of showing:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Hubbard*, *supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant's claim satisfies the first prong of the *Duren* test because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard*, *supra* at 473. However, defendant has not satisfied the second prong of the test. Defendant asserts that a distinctive group in the community was substantially underrepresented in his jury venire, but he bases his assertion solely on statements made at trial that only two African-Americans were included in the jury venire and that Kent County is comprised of eight to nine percent African-Americans. Although there was apparently some disparity between the number of African-Americans included in defendant's jury venire and the number residing in the community, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie

case." *Howard*, *supra* at 533. Therefore, because defendant relies entirely upon unsupported statistics, and presents no evidence of the makeup of jury venires in Kent County in general, the second prong of the *Duren* test is not satisfied. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Even if we assumed that African-Americans are underrepresented in jury venires in Kent County, to satisfy the third prong of the *Duren* test, defendant had to show that the underrepresentation was due to a systematic exclusion of African-Americans from jury selection. *Hubbard*, *supra* at 473. "'[I]t is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate.'" *Williams*, *supra* at 526, quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Rather, there must be a demonstrated problem inherent in the selection process that results in systematic exclusion. *Id*. Defendant failed to present any evidence regarding the jury selection process in Kent County. Therefore, we cannot conclude that African-Americans are systematically excluded from jury service. Defendant's "bald assertion" that systematic exclusion occurred is insufficient to satisfy the third prong of the *Duren* test. *Id*. at 527. Defendant has clearly failed to establish a prima facie violation of the Sixth Amendment, and is not entitled to relief. Further, defendant presented no evidence or an affidavit, to show that a remand is warranted, as required by MCR 7.211(C)(1)(a)(ii).

Alternatively, defendant contends that he was denied his Fourteenth Amendment, US Const, Am XIV, right to equal protection of the law, claiming that he has shown a prima facie case of discrimination against African-Americans in jury selection in Kent County. To present a prima facie case of discrimination in the context of jury selection, defendant must

> (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. *Williams*, *supra* at 527-528.

Further, defendant must show discriminatory intent. *People v Glass (After Remand)*, 464 Mich 266, 284-285; 627 NW2d 261 (2001). Defendant failed to offer evidence that African-Americans were underrepresented over a significant period, that the selection process is susceptible of abuse or not racially neutral, or the presence of discriminatory intent. Moreover, defendant provided no indication of what further proof he would present if a remand was granted. See MCR 7.211(C)(1)(a)(ii). Therefore, defendant is not entitled to relief.

Defendant next argues that there was insufficient evidence to warrant his conviction of assault with intent to do great bodily harm less than murder. We review sufficiency of the evidence claims in criminal cases de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been met beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Viewed in this light, the evidence presented at trial was sufficient to sustain defendant's conviction.

Assault with intent to do great bodily harm less than murder is a specific intent crime. The elements are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Defendant argues that there was insufficient evidence to support the essential element of "intent." This Court has defined the intent to do great bodily harm as "'an intent to do serious injury of an aggravated nature.'" *Brown*, *supra* at 147, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Because of the difficulty of "proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). An intent to do great bodily harm less than murder can be inferred from the defendant's conduct, including the fact that the defendant used a dangerous weapon. *Parcha*, *supra* at 239; *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970).

In the present case, witnesses testified that defendant shot at Montery, at least two times, at close range, and that defendant continued to shoot as Montery ran away. One bullet traveled through Montery's upper left chest and left shoulder, and a second bullet grazed his abdomen at an angle. Based on this evidence, a reasonable juror could conclude that defendant intended to do great bodily harm less than murder beyond a reasonable doubt. See *Parcha*, *supra* at 239; *Crane*, *supra* at 204. Although defendant claims that he stopped shooting when Montery ran away, and that Michael and Kirkland's testimonies to the contrary are inherently incredible, we give deference to the jury's findings on issues of credibility and intent, *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998), and we view the evidence in the light most favorable to the prosecution. *Tombs*, *supra*. It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant also argues that there was insufficient evidence presented at trial to establish his identity as the person who shot Montery. But, because defendant admitted at trial that he shot Montery, we find that any attempt to argue otherwise on appeal is futile.

Alternatively, defendant argues that there was insufficient evidence presented at trial to overcome his theory of self-defense. Defendant testified that, when he shot Montery, he believed his life was in danger and that he only intended to protect himself. "'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'" *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005), quoting *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). A claim of self-defense requires that the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990).

In deciding whether the defendant feared for his safety, the jury must consider the circumstances as they appeared to the defendant at the time, *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976), but the defendant's belief that he is in danger must be a reasonable belief, *Heflin*, *supra* at 502. Defendant claims he believed Montery had a gun on his person at

the time of the shooting and, therefore, that his life was in danger when Montery punched him. Defendant concluded that Montery was carrying a gun because Montery showed him a gun on a prior occasion, Montery was known to fight, and Montery suddenly and violently attacked him. However, defendant admits that he did not see Montery with a gun on the day of the shooting, and that Montery punched him only once. Further, there is no evidence that defendant saw Montery reach for a weapon before defendant shot him. And, the evidence revealed that Montery ran away when the shooting started but defendant kept shooting. Based on this evidence, a reasonable juror could conclude that defendant's belief that he was in danger of death or great bodily harm was unreasonable. *Heflin*, *supra* at 502.

Moreover, to have a valid claim of self-defense, defendant must not be the initial aggressor or, in other words, defendant must have acted in response to an assault. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other gds 467 Mich 916 (2003). Although defendant and Michael testified that Montery was the initial aggressor, Kirkland testified that defendant struck Montery first. We will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Lemmon*, *supra* at 646. There was sufficient evidence presented at trial to overcome defendant's theory of self-defense.

Defendant next claims that the prosecutor failed to use due diligence to produce Montery as a witness at trial. Because defendant did not raise the issue at trial, it is not properly preserved and will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*.

A res gestae witness is a person who witnessed some event in the continuum of the criminal transaction whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). A prosecutor no longer has a duty to produce all res gestae witnesses at trial, pursuant to MCL 767.40a. However, once a witness has been endorsed under MCL 767.40a(3), the prosecutor must use due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The test for due diligence is whether the prosecutor made a good faith effort to produce the witness, "not whether increased efforts would have produced" the witness at trial. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). Absent a due diligence hearing on the matter, it is impossible for this Court to determine, with certainty, what steps the prosecutor took to produce Montery as a witness. We find, however, that there is no basis, in the evidence of record, on which to conclude that the prosecutor made anything less than a good faith effort to produce Montery at trial. Defendant has provided no evidence that the prosecutor failed to contact the individuals who had information concerning Montery's whereabouts or that they would have willingly provided assistance in producing him if asked to do so. Moreover, evidence presented at trial indicates that it was difficult for law enforcement officers to locate Montery. A detective testified that, although he was working with Michael to produce Montery at trial, he was only able to interview Montery over the telephone. Because there was a material witness warrant outstanding for Montery, the detective would have arrested Montery if he had been able to locate him in person.

Further, regardless whether the prosecutor used due diligence, the evidence of record does not show that defendant was actually prejudiced by Montery's failure to testify. A "new

trial is not automatically warranted simply because the prosecution has failed to exercise due diligence in the production of a missing res gestae witness. The key issue in determining the proper remedy for the defendant . . . is whether the defendant is prejudiced." *People v Pearson*, 404 Mich 698, 724; 273 NW2d 856 (1979), superseded in part on other gds MCL 767.40. Even if Montery made statements favorable to defendant when talking to police, it is impossible for this Court to know how Montery, the victim of the shooting, would have testified at trial. Defendant has not shown the existence of plain error affecting his substantial rights. *Carines*, *supra.*

Finally, defendant claims defense counsel was constitutionally ineffective for a number of reasons. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *Id*.

To establish ineffective assistance of counsel, defendant must show that trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Defendant must show that, but for trial counsel's error, there is a reasonable probability that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *Id*.

Defendant argues that he was prejudiced by Montery's failure to testify and, therefore, that defense counsel was ineffective for failing to request assistance in locating Montery, to object to the prosecutor's lack of due diligence, and to request a missing witness jury instruction. Defendant is correct in arguing that defense counsel could have requested assistance in producing Montery. See MCL 767.40a(5). Further, if the trial court had determined that the prosecutor failed to use due diligence to produce Montery, defense counsel could have requested the missing person jury instruction. See CJI2d 5.12. However, defendant has provided no evidence that Montery would have testified in his favor. As we previously stated, it is impossible to know how Montery, the victim, would have testified at trial. In fact, it is very possible that Montery's testimony would have been harmful to defendant's case. Therefore, in the absence of evidence to the contrary, we presume that defense counsel's failure to pursue Montery as a witness was a strategic decision. *Henry*, *supra* at 145-146.

Additionally, defendant argues that defense counsel was ineffective for failing to object to Kirkland's testimony, because she based her identification of defendant on impermissible hearsay. However, there was no legitimate question at trial concerning defendant's identity as the shooter. Hence, defendant cannot demonstrate that his trial counsel's failure to object affected the outcome of the trial. *Henry*, *supra* at 146.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's argument that defendant was seeking revenge when he shot Montery. Simmons testified that, after the shooting, defendant said, "take that for hitting my cousin." Defendant asserts that, by referencing this statement in his opening and closing arguments, the prosecutor led the jury to believe that defendant was seeking revenge, and that this "revenge theory" was inconsistent with testimony that defendant's argument with Montery involved marijuana.

However, defendant offered no evidence that the prosecutor's argument was actually improper and we conclude that it was a permissible commentary on the inferences to be drawn from the testimony presented at trial. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Therefore, defense counsel cannot be deemed ineffective for failing to object to it. *People v McGhee*, 268 Mich App 600, 626-627; 709 NW2d 595 (2005). Further, defense counsel raised Simmons' credibility as an issue for the jury in his closing argument. Therefore, there is no evidence that defense counsel's failure to object was outcome determinative.

Defendant also argues that defense counsel was ineffective for failing to impeach Michael and Kirkland at trial. Defendant asserts that their testimony regarding the number of shots defendant fired was inconsistent and was contrary to Montery's statements to the police after the shooting. But cross-examination is a matter of trial strategy that we will not second-guess. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, defense counsel elicited testimony from a crime scene technician that witnesses to shootings are often incorrect about the number of shots actually fired because of hearing bullets ricochet, thereby raising the witnesses' credibility as an issue for the jury. We conclude that defense counsel was not ineffective with respect to his treatment of Michael and Kirkland.

Defendant next argues that defense counsel was ineffective for failing to request an alternate verdict of the lesser included offenses of assault, assault and battery, and felonious assault. However, a requested instruction on a lesser offense is only proper if "a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A rational view of the evidence would not support a conviction of assault, or assault and battery, because defendant admitted to the use of a dangerous weapon. Further, the evidence would not have supported a felonious assault conviction. Considering that defendant fired his gun directly at the victim more than once, at close range, and that the jury rejected defendant's self-defense claim, there is no way the jury could have found that defendant lacked the intent to cause at least great bodily harm less than murder. Therefore, because trial counsel is not required to advocate a meritless position, defense counsel did not err in failing to request an instruction on these lesser offenses. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant alleges that defense counsel was ineffective for several additional reasons, and claims that he was prejudiced by each of the alleged errors. However, defendant failed to support any of the additional claims either factually or legally. Therefore, defendant has abandoned these claims of error. See *People v Martin*, 271 Mich App 480, 315; 721 NW2d 815 (2006).

There were no errors warranting relief.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray